

UNITED STATES OF AMERICA

BEFORE

THE NATIONAL LABOR RELATIONS BOARD,
REGION 28

NV Energy, Inc.,

Employer

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO,
LOCAL 396

Petitioner

28 UC 243

PETITIONER'S
REQUEST FOR REVIEW

Petitioner filed a UC petition January 26, 2009. The unit presently represented by Petitioner at NV Energy, Inc. is generally described as the employees who are employed by the employer in Customer Service, Districts, Material/Warehousing, Reprographic Services, Mail Room/Receiving Departments, Lines, Fleet Services, Communications, Materials, Generation, Substations and Survey Organizations. It excludes supervisory, confidential and professional employees. It consists of approximately 1150 employees.

Petitioner sought to have 15 additional positions added to the existing bargaining unit. The positions exist because NVE hired 15 people to operate, maintain and stock materials and supplies at the Higgins generating plant it acquired in October, 2008. The

positions, as hereafter more fully discussed, include individuals performing control operator/combined cycle operator work who the company is calling "plant operators," mechanical, electrical and maintenance workers who it is calling "maintenance specialists," and an individual hired through an employment agency who is performing materialman/warehouseman work, a position referred to as a **"warehouse technician."**¹

All of the individuals sought were hired directly by NVE and assigned to work at the Higgins Generating Plant in Clark County, Nevada. They perform the same, or substantially similar work as existing employees of the employer working in Clark County, all of which are bargaining unit under the present CBA between NVE and Petitioner. Emp. Ex. 1. The hearing took place February 11, 12, 17, 18 and 19, 2009.

Thereafter, the Regional Director issued a Decision and Order on March 12, 2009.

Pursuant to that Decision and Order, the Regional Director ordered that the "plant operators" and the "maintenance specialists" be and are accreted to the existing collective bargaining unit. Petitioner takes no issue with that portion of the Decision and Order.

However, the Regional Director also ruled that the materialman/warehouseman position is not accreted to the existing collective bargaining. Petitioner believes that the Regional

¹ The initial petition was awkwardly worded. To avoid confusion, it was amended to clearly identify the warehouse technician as being part of the group sought.

Director erred in excluding that position.² If that error goes uncorrected, this singular position will be the only craft position not part of the bargaining unit with respect to employees employed by NV Energy in Southern Nevada. This Request for Review is based upon the fact that the Decision and Order is clearly erroneous regarding substantial factual issues in a manner which prejudicially affects the rights of a party. Moreover, exclusion of the position effects a departure from Board policy which favors protecting the rights of employees to organize for the purposes of self protection in that, by denying accretion to this singular position, the Regional Director has rendered the affected individual a "one man bargaining unit," thereby negating his right to collectively bargain.

SUMMARY OF EVIDENCE BEARING ON THE ISSUE

Petitioner and NVE have a long and storied history of collective bargaining that is

² Daniel Torres is the individual in question. He did not testify at the hearing, however, evidence regarding his job functions and supervision was presented through the worker who trained him. Prior to going to work at the Higgins plant, Mr. Torres was working at NVE's Clark plant. While there bargaining unit member, Tim Johnson, a bargaining unit warehouse technician, taught him how to be a warehouseman. In particular, Mr. Johnson trained him with respect to use of "Passport," a computer program used throughout NVE with respect to materials handling. The system had been used at the Clark plant for quite some time and, after NVE purchased the Higgins facility, was implemented at the Higgins plant. After that training, NVE transferred Torres to Higgins where he does the warehousing work. Since his transfer, he has been supervised at Higgins by Mr. William Robinson, the same person who supervises Mr. Johnson at the Clark plant. On numerous occasions when Mr. Robinson was at Higgins, he called Mr. Johnson and put him on speakerphone to train Mr. Torres regarding matters pertaining to warehousing. See Johnson testimony TR 108-146 and Petitioner Exhibit 24 (warehouse technician job description). The only evidence adduced with respect to Mr. Torres' job was that which Petitioner introduced. Respondent introduced no refuting evidence, although it claimed Mr. Torres was a "contractor" rather than an employee. Essentially, he was hired as a temporary worker and left on the payroll of the employment agency who referred him. The decision whether, and to what degree NVE can hire temporaries as contractors, and for how long they can serve as such is covered by the CBA. See Emp. Ex. 1 p. 8-9, Art. 5.1 (regarding temporary workers); p74, Art. 4.3; p.102, Art. 4.3.

traced back to the 1950's. From 1955 to the present NVE (previously Nevada Power Company) had collective bargaining agreements with the IBEW. Throughout that entire period, the IBEW represented the same type employee that is at issue in this Request for Review, to wit: the warehouse employee (also called material specialist). Every basic craft position the company has in Clark County, Nevada is represented by Local 396.³ See testimony of Jesse Newman, Assistant Business Manager, Local 396, TR 536-639.

Article 1.1 of the current CBA (Emp. Ex. 1) reads, in pertinent part: 'The Company, in Clark and Nye counties, in the state of Nevada, a public utility engaged in the service of generating, transmitting and distributing electric power and energy, hereby recognizes Local 396 of the International Brotherhood of Electrical Workers, A.F.L./C.I.O., as the exclusive bargaining agent for its employees who are employed in Customer Service, Districts, Material/Warehousing, Reprographic Services, Mail Room/Receiving Departments, Lines, Fleet Services, Meter Services, Communications, **Materials, Generation**, Substations and Survey Organizations excluding all supervisory and professional employees within the meaning of the National Labor Relations Act, ... for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment which may be subject to collective bargaining. Emp. Ex. 1 p3. Although the cited language comes from the most recent CBA, from the 1950's to the present, the company has been represented by the IBEW in all NVE owned generating plants and substations in Clark County where it employs

³ Job descriptions in the existing CBA are set forth on pages 82-92, 118-122, 132-133 and 144-145 of Emp. Ex. 1. The description for the warehouse technician position sought by Petitioner is in Ex. P. 24.

workers. Moreover, the IBEW has always represented the materialman/warehouseman positions⁴.

Only now, for the first time, with the addition of the Higgins plant, does NVE claim that the IBEW does not represent materialman/warehouseman employees at a generating plant in Clark County. Emp. Ex. 1, p. 120 defines the work of the materialman under the classification referred to as **"Material Specialist."** It states that this person: Performs manual and clerical duties in connection with receiving, storing and issuing supplies, tools, and equipment, unloads and unpacks incoming materials; places shelves and racks stock of machine, hand and construction tools; measures, counts, cuts, crates, marks and stencils materials, supplies, tools and equipment; keeps the premises clean; drives a car or pickup in local purchases of materials and equipment.

There is no better way to get a clear understanding of the duties and responsibilities of the material specialist and warehouseman positions than to read the current CBA (Emp. Ex. 1) and Petitioner Ex. 24, and to read the entire testimony of material specialist, Mr. Tim Johnson, commencing at TR 108. As testified to by Mr.

⁴ CBA's from 1974 through the present were made available for inspection by the Hearing Officer and the employer during the hearing. To avoid cluttering the record, only the most recent CBA was introduced as an exhibit. Emp. Ex. 1. Most of the bargaining unit positions which have existed are described in the most recent CBA.. As a result of a printing error, the warehouse technician, was omitted from Emp. Ex. 1. By letter of agreement, the parties agreed that it was to be included. See Petitioner Ex 24. So essentially, with the exception of security guards, statutory supervisors and certain non-craft MPAT employees, all NVE employees are and have been bargaining unit for decades.

Johnson⁵, Torres performs the job of a material specialist at Higgins. TR 115 L12-18.

The material specialist performs "... all of the handling of materials in regards to receiving, shipping, issuing materials and inventory control. Any aspects in regards to materials handling in the warehouse on the plant side." TR 108 L20-24. The job is essentially that of warehouseman. TR 109 L1. The cited exhibits and the Johnson testimony establish, by a preponderance of the evidence, the nature of work performed by Daniel Torres (the individual Petition claims as part of the bargaining unit) and the strong degree of interaction between Johnson and Torres in warehousing matters. Additionally, they establish the supervisory chain as it pertains to both Johnson and Torres.

Under the system used throughout NVE, supplies and materials are tracked and available for the use of any plant owned by NVE in Clark County, including the Higgins plant, through a company wide warehousing system administered through the Passport (aka Portal) computer program. The exact same system is used throughout NVE's southern operations to track work orders. See testimony of warehouseman (Material Specialist) Tim Johnson, a bargaining unit employee assigned to the Clark generating plant. TR 108-146. As pointed out by Mr. Johnson, if a plant needs an item, the material specialist accesses the Passport system on the NVE computer. When he does, a list appears detailing exactly which of all Clark County plants which have the part

⁵ Mr. Johnson began his work with NVE in the same fashion as Daniel Torres. Each was hired as a temporary worker supplied by an employment agency. Potecho Temporary Services, in the case of Johnson; Pro in the case of Torres. TR 109 L15 thru 21, TR 111 L12-17. The only difference is that Johnson worked 1500 hours, so the NVE was required to make him a permanent full time employee. TR 110 L8. Torres worked 1400 hours, then got transferred to Higgins where, although he does the same work (and has now worked total hours far in excess of 1500), NVE has not made him a permanent employee. TR 116 L10. Through this mechanism, NVE has attempted to side step Article 5.1 of the CBA (Emp. Ex. 1, p9).

in their stock and setting forth the number available. Supplies available at each one of the plants appear on the screen. Thereafter, if the part is available at Higgins, contact is made with the warehouse person at Higgins (Daniel Torres). As pointed out by Mr. Johnson, he deals with Higgins regularly and, more particularly, with "Daniel Torres who is working in the warehouse filling the function a material specialist would do⁶." TR 111 L2-6, 135 L12. If Higgins does not have an immediate use for the item, another plant can commandeer it, at which time it is either delivered directly to the other plant through interoffice mail, or it is sent via FedEx, depending on the size of the item. The item is then automatically reordered on the company's reorder system. The system works both ways, that is, Higgins employees can access the Passport system, see what supplies are available at all of the other Clark County facilities and obtain what is needed for Higgins through the same system. Furthermore, to illustrate the interaction between the Higgins and Clark plants, Johnson testified regarding a situation he was personally aware of when vibration probes needed at Clark were acquired from Higgins through use of this system. After they were located at Higgins through use of the Passport system, arrangements were made for them to be sent to Clark and the probes were personally delivered to Clark by Higgins warehouseman Daniel Torres. TR 124 L13-15.

Moreover, Johnson testified regarding a situation occurring the Friday before his testimony when Torres called him for assistance in handling a "no substitute" item incorrectly delivered to Higgins, which Torres did not know how to handle. TR 141 L1-

⁶ Petitioner did not go through the time consuming process of having Johnson run through each and every function the material specialist does. One only needs to look at the job description set forth in the CBA (Emp. Ex. 1) to do so. By doing so, one can easily determine Torres' job functions.

18. So, on the Higgins end, the warehouse person (Daniel Torres) received an item Higgins was not supposed to receive and called on the Clark employee to explain how to handle it. It is clear that Torres was functioning as a materials specialist or warehouseman at Higgins. It is equally as clear that mistakes at Higgins caused an impact upon the employees of another plant, resulting in the expenditure of man hours on both sides and a coordinated effort to remedy the situation.

According to Mr. Johnson, Mr. Torres worked initially at Clark in a temporary assignment. Johnson and Torres worked hand in hand. TR 116 L18-22. Because Torres was a temporary, NVE was obligated under the CBA to make him a full time employee when he worked 1500 hours. CBA Article 5.1 reads, in pertinent part: If an employee works at least 1,500 hours during a twelve (12) month period in the same temporary position, the position will become authorized and the employee will be offered regular status in that position. Emp. Ex. 1 p9. According to Mr. Johnson, Torres worked hand in hand with him as a material specialist at the Clark plant for 1400 hours. TR 111 L22. Thus, it was nearing the time when NVE was required to provide him with a permanent position. Rather than do so, NVE transferred Torres to Higgins where he performed the same basic tasks as Mr. Johnson. In fact, prior to Torres being transferred, with his boss' okay and knowledge, Johnson trained him to perform warehouseman tasks. TR 130 L20 & 23-24; 141 L20-142 L2. The training was conducted at Johnson's work station using an extra NVE computer. Training was conducted with respect to NVE's Portal program (aka Passport) which is available on the company intranet. Thereafter, since the transfer, Johnson has been called regularly by Torres with questions regarding how the

warehousing system in use at Higgins operates. TR 122 L17- 123 L13. Moreover, he has been called from time to time by Bill Robinson (who serves both as Johnson's supervisor at Clark and Torres' supervisor at Higgins) to discuss matters pertaining to "location assignments," with Mr. Torres participating in the calls. In fact, the purpose of the calls has been to have Johnson explain to Torres how to handle location assignments arising under the NVE warehouse system, and to discuss other warehousing matters. TR 122 L8-19.

The testimony of Mr. Johnson, who worked side by side with Torres, who trained him, and who speaks with him regularly about job problems adequately establishes the nature of Torres' duties at the plant. As Johnson pointed out, Torres manages material requests for Higgins. TR 131 L25. Johnson indicated he talked to Torres a number of times since his transfer to Higgins and even cited a recent example (the Friday before his testimony) when Torres called him looking for advice regarding how to handle an item. TR 135 L12 & 14-21.

The Regional Director's conclusion that there is "scant record testimony concerning Torres duties at the plant" ignores the clear weight of evidence and is clearly erroneous. His conclusion is directly contradicted by both Johnson's testimony and the job descriptions introduced by the Petitioner (CBA p. 120 and Petitioner 24). Moreover, employer witness, Thomas Price, who served as the plant director at both the Clark plant and the Higgins plant, and who actually authorized the hiring of Torres, described Torres as a warehouse person. TR 778 L7-9; L15-17; 786 L2-4. Additionally, Price pointed out that the function of the person he authorized to be hired involved doing a "count," a

function squarely referenced in the Material Specialist job description. TR 778 L10; CBA p. 120. Lastly, employer witness Kevin Newcomb, a Higgins employee who must unload incoming materials when the warehouseman is unavailable, testified "We have a warehouseman now, Dan, and if he's not there and a delivery would come in, myself, the mechanics, or operations would be called on to load or unload, whatever needs to be. He identified the Dan as Dan Torres. TR 716 L4-9. Higgins employees recognize that Torres performs the warehouseman functions. The Regional Director erred in not doing so also. Clearly, Petitioner met its burden of establishing Torres' duties by a preponderance of the evidence. Once it did so, the burden shifted to the employer to bring in countervailing evidence, if any existed. The testimony was not rebut by the employer, and it did not bring Torres in to testify, notwithstanding that he was under NVE's direct control and it could have done so easily⁷.

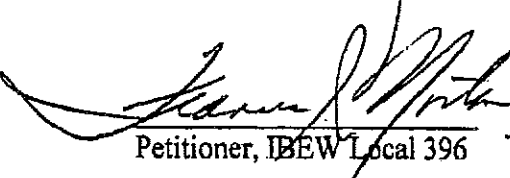
The Regional Director also erred with respect to its conclusion that there is little testimony concerning who supervises Torres at Higgins. It is Bill Robinson. The testimony with respect to who supervises Torres came in several forms. First, Mr. Johnson identified Bill Robinson as being his direct supervisor (TR 141 L12) and the person who is "responsible for the warehouse at Higgins." TR 129 L17-18. He pointed out that Robinson goes back and forth between the two plants. TR 141 L19. Moreover, he gave examples of Robinson, while in the company of Torres, calling him from Higgins and requesting him to provide assistance to Torres to clear up problems at Higgins. Mr.

⁷ Under the missing witness rule, an inference should be drawn that, if called, Torres would have testified in a manner corroborating Johnson's description of his job. U.S. v. Pitts 918 F2d 197, 199 (D.C. Cir. 1990).

Robinson reports to Jeff Smith (the Operations Manager at Clark). TR 129 L5-11. Mr. Smith reports to Steve Page (the plant director at Clark and Higgins). TR 143 L19-23. Moreover, Petitioner introduced a recent employee information profile maintained in company records showing that Mr. Torres is an employee of NVE who is still assigned to Clark for purposes of supervision. Pet. Ex. 14e. The entire chain of supervision was established. Again, Petitioner met its burden. Once it did so, the burden shifted to the employer to bring in countervailing evidence, if any existed.

The fundamental purpose of the accretion doctrine is to “preserve industrial stability by allowing adjustments in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created or other alterations in industrial routine are made.” NLRB v. Stevens Ford, Inc., 773 R2d 468, 473 (2nd Cir. 1985). Where, as in the case at hand, the new employees have little or no separate identity and share such an overwhelming community of interest with the preexisting unit, they should be accreted. NLRB v. St Regis Paper, 674 F. 2d 104 (1st Cir. 1982); Safety Carrier, 306 NLRB at 969; Progressive Die Co., 323 NLRB 183 (1997). This is especially true when, but for the chicanery of transferring an employee to a newly acquired plant, the employer would have been obligated under the CBA to hire the employee as a permanent employee.

Respectfully submitted,


Petitioner, IBEW Local 396 #2350

CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury, that on March 26, 2009, he/she served Petitioner's Request For Review upon the parties hereto as hereafter set forth:

1. National Labor Relations Board, Executive Secretary, 1099 14th Street, N.W., Washington, C.C. 20570 by electronic filing in accordance with E-Gov on the NLRB website @ www.nlr.gov.
2. Respondent employer, NV Energy, Inc. by service upon its legal counsel David Lonergran, Esq., Hunton & Williams LLP, 1445 Ross Ave. Ste 3700, Dallar, Texas 75202 by electronic service to dlonergan@hunton.com. A copy was also sent by first class mail, postage prepaid, to the address set forth above.

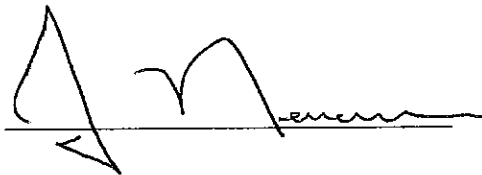
Dated this ____ day of March, 2009.

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Dated this 25 day of March, 2009.

A handwritten signature in black ink, appearing to read "David Lonergran", is written over a horizontal line.